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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-79-86

AMY T. CRITZER,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, Amy T. Critzer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered on April 18, 1979.

OPINIONS BELOW

The Trial Judge's recommended decision appears in Appendix A hereto. The opinion of the Court of Claims, which is not yet reported, appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Claims was entered on April 18, 1979, and this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether an Indian's improvements on her trust land (a motel, restaurant, and two craft shops) are tax exempt where (a) the IRS concedes that the underlying land itself (as opposed to the improvements) is tax exempt, (b) the improvements are only those necessary to enable the Indian to realize the natural potential of her land, (c) the Department of the Interior, the agency charged with responsibility for administering the federal trust responsibilities to Indians, has interpreted the laws it administers to require that the improvements be tax exempt, and (d) this Court has previously ruled that a tax exemption applicable to Indian trust land applies equally to the improvements on that land. *United States* v. *Rickert*, 188 U.S. 432 (1903).

2. Whether an Indian's income from catering to tourists on her trust land is tax exempt, where (a) the IRS concedes that income from farming and ranching businesses (as opposed to tourist businesses) on this same trust land would be tax exempt, (b) the land in question is not fit for farming or ranching, or timber or mineral development, (c) the Department of the Interior has interpreted the laws it administers to require that the type of income involved here be tax exempt, and (d) the congressional policy of encouraging Indians to use their land to become self-sufficient is the same here as it was in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), where this Court exempted Indian income from the use of trust land based upon that policy.

These questions are important because they vitally affect the congressional policy of encouraging Indians to use their land to become self-sufficient. The Court of Claims has now reversed what the Interior Department and Indian tribes (and the trial judge) have believed to be the law, based upon the congressional policy as construed by the *Rickert*, *Capoeman*, and other cases. Hundreds, and probably thousands, of Indians all over the

country are deriving income from improvements on their trust land, and from businesses on their trust land other than farming, ranching, timber, or mineral businesses. Most, if not all, of them have been advised by the Interior Department, or by others relying upon the Interior Department's position, that their income is tax exempt. A disheartening amount of litigation and uncertainty, and consequent interference with federal and Indian development plans all over the country, is in store unless and until this Court settles the matter.

STATUTES INVOLVED

The principal statute involved in this case is the Act of June 4, 1924, ch. 253, 43 Stat. 376, 25 U.S.C. § 331 (note), also known as the Eastern Cherokee Allotment Act, which reads in pertinent part as follows:

> . . . [A]ll restricted allotments and undivided property shall be exempt from taxation until the restrictions on the alienation of such allotments are removed or the title of the band to such undivided property is extinguished.

While this case happens to arise under the aforesaid special allotment act, the decision affects all trust allotments under Section 5 of the General Allotment Act of 1887, ch. 119, 24 Stat. 388, 25 U.S.C. § 348, construed in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), and under almost all other special allotment acts. *See* notes 2, 16, and 31, *infra*.

STATEMENT

In this case of first impression, the petitioner, Amy Critzer, seeks a determination of whether the rental and operating income she has earned from using her trust land for tourist-oriented businesses on the Eastern Cherokee Indian Reservation is exempt from federal income taxes. The trial judge held that it was, but the Court of Claims held that it was not.

Amy Critzer is a three-quarter blood, non-competent Cherokee Indian and an enrolled member of the Eastern Band of Cherokee Indians of North Carolina. She is a 68-year old widow who was born on the Eastern Cherokee Reservation and presently resides there.[1]

The lands in question are Mrs. Critzer's possessory holdings on the Eastern Cherokee Reservation.[2] They consist of several acres on a highway, on which are a motel and restaurant, and two town lots in the village of Cherokee, on which are two craft shops, one with four small tourist apartments.[3]

The lands of the Eastern Cherokee Reservation are located in the Great Smoky Mountains and are generally too stony and hilly for profitable agricultural or grazing pursuits. However, the Reservation is located adjacent to the Great Smoky Mountains National Park in an area of beautiful mountains and a scenic river, all of which are highly attractive to tourists. As a result, about 170 tourist-oriented businesses had developed on the Reservation by 1972 and tourism is by far the number one factor in the Eastern Cherokee economy. These businesses provide badly-needed jobs and income during the short tourist season each year which help sustain the Tribe and the individual Indians all year long.[4] The Bureau of Indian Affairs played a major role in developing these Indian businesses through supervision of leasing and other programs and assistance.[5]

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[1] Finding 2.

[2] While there are certain technical differences between "possessory holdings," as they are called on the Eastern Cherokee Reservation, and trust allotments on other Indian reservations, the Government conceded for purposes of the appeal in this case that they were the same. *See* Appendix ("App.") at B-5 n.7.

[3] Findings 7, 14-19, 21, and 27.

[4] Findings 14, 18, 21, 37, 41, and 42.

[5] Findings 52-61, and 64.

Mrs. Critzer's possessory holdings, like others on the Reservation, are unsuited for farming, ranching, or timber or mineral production.[6] However, they are located on the main tourist road and ideally suited for tourist-oriented enterprises. Thus, she developed her land in about the only way she could. She used the stones from her land in constructing her motel and she has a garden producing fruits and vegetables for use in her restaurant.[7] In essence, Mrs. Critzer took normal advantage of the only valuable intrinsic attributes of her lands to make her living from them.

Mrs. Critzer began developing her possessory holdings in the early 1950's, starting with virtually no money. She was unable even to obtain a mortgage because her land was held in trust by the United States. She gradually built and rebuilt the properties over a 15-year period largely through her own hard work.[8] She ran the motel herself as her livelihood, and part of the time she rented the two craft shops to others to run. Her businesses are open only during the short tourist season each year.[9]

Pursuant to leases entered under BIA supervision, Mrs. Critzer has received rental income from her two craft shops and operating income from her motel and restaurant.[10] Once Mrs. Critzer developed her possessory holdings to the point where she was finally able to make a comfortable living from them in accordance with the congressional Indian policy encouraging her to do just that, the Internal Revenue Service (IRS) sought not just to tax her, but to prosecute her for tax evasion. Although the IRS, through the Justice Department, maintained that Mrs. Critzer's income was taxable, the Interior De-

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[6] Findings 13 and 37. Mrs. Critzer actually attempted to operate a truck farm on her land in the early 1950's, but was unsuccessful.

[7] Findings 7 and 13.

[8] Findings 4, 6, 7, 9-11, 13, 15-17, 19, and 23.

[9] Findings 9, 11, and 23.

[10] Findings 17, 20, 24, and 60.

partment took, and continues in this case to take, the position that it was not. The United States Court of Appeals for the Fourth Circuit held that given the dispute between co-equal branches of the Government over the taxability of her income, and the advice given to her, Mrs. Critzer could not as a matter of law have had the requisite criminal intent to evade taxes.[11]

Mrs. Critzer subsequently paid the $8,941.59 in taxes allegedly due for 1971 and sought a refund in the Court of Claims in order to test the exemption issue in a civil proceeding.[12] She contended that her income was exempt under this Court's decisions in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), and *United States* v. *Rickert*, 188 U.S. 432 (1903), and other cases, and that her income was indistinguishable from farming and ranching income (which, like Mrs. Critzer's income, involve elements of land, labor, capital, and improvements) which the IRS agrees is tax exempt.[13] On July 12, 1977, the trial judge ruled in Mrs. Critzer's favor. On April 18, 1979, the Court of Claims reversed and held that Mrs. Critzer's income was taxable, although indicating that the bare land component of an Indian's business income might be exempt under some type of allocation formula.[14]

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[11] *United States* v. *Critzer*, 498 F.2d 1160 (4th Cir. 1974). The Fourth Circuit did not decide the exemption issue, expressly leaving it for a future proceeding.

[12] The Government filed a counterclaim for alleged deficiencies and interest totaling $6,622.76. Mrs. Critzer also has pending in the Tax Court the same tax exemption issue for the years 1963-70 and 1972-77. (Docket No. 10226-75.) The taxes, penalties, and interest involved in that case total $207,630.86 for the 14 years in issue. Mrs. Critzer has conceded that the portion of her adjusted gross income attributable to interest and dividends is fully taxable. She claims only that income from her land is exempt.

[13] Rev. Rul. 56-342, 1956-2 C.B. 20 (farming income); Rev. Rul. 62-16, 1962-1 C.B. 7 (ranching income). The IRS concedes that income such as Mrs. Critzer's which is earned *by a tribe* is tax exempt. Rev. Rul. 67-284, 1967-2 C.B. 55.

[14] App. at B-11 - B-12.

REASONS FOR GRANTING THE PETITION

This case presents a uniquely important and unresolved question concerning the scope of the tax exemption decreed by Congress in the General Allotment Act[15] and other similar acts[16] for the purpose of promoting individual Indian economic self-sufficiency. As this Court recognized in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), Congress issued allotments to individual Indians with an exemption from taxation to encourage the Indians to use their land to achieve a "state of competency and independence."[17] In applying this congressional policy, the courts have consistently followed the maxim of liberal construction of Indian statutes,[18] resisting the niggardly approach of the IRS and ruling in favor of promoting Indian economic self-sufficiency.[19]

Here, as in the past, the Interior Department, as the agency charged with administering the federal Indian

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[15] Ch. 119, 24 Stat. 388, 25 U.S.C. § 331 *et seq.*

[16] The Act of June 4, 1924, ch. 253, 43 Stat. 376, 25 U.S.C. § 331 (note), making allotments to the Eastern Cherokee Indians and granting an express exemption from taxation, like many similar statutes, is patterned after the General Allotment Act. All of these acts are construed *in pari materia*. *See* note 31, *infra*.

[17] 351 U.S. at 10.

[18] *Squire* v. *Capoeman*, 351 U.S. at 6-7. We note that in *Capoeman* the land tax exemption, which was extended by this Court to income, was found in the General Allotment Act by implication. Here it is found in the *express* language of the Eastern Cherokee Allotment Act ("shall be exempt from taxation"). Thus, there is all the more reason to construe the statute favorably to petitioner.

[19] *See, e.g.*, *Stevens* v. *Comm'r*, 452 F.2d 741 (9th Cir. 1971) (exempting farming and ranching income). *United States* v. *Dancy*, 270 F.2d 791 (10th Cir. 1966) (exempting lease bonus income); *United States* v. *Hallam*, 304 F.2d 620 (10th Cir. 1962) (exempting income from the sale of minerals); *Big Eagle* v. *United States*, 156 Ct. Cl. 665, 300 F.2d 765 (1962) (exempting mineral headright income); *United States* v. *Anderson*, 442 F. Supp. 10 (D. Mont. 1977) (exempting income from grazing on a range unit).

trust responsibilities, has adopted a construction of the tax exemption that would promote the congressional policy of making Indians self-sufficient.[20] The IRS has taken a contrary view, followed by the Court of Claims, which, if allowed to stand, will seriously stifle badly needed economic development on Indian reservations throughout the United States. Indians whose allotments are useless for farming, ranching or timber or mineral development will not have the tax advantage that other Indians have, and without that advantage they have less economic incentive to use their land to become self-sufficient.

We are unable to understand the logic of the IRS position that farming and ranching, which involves labor, capital and equipment as well as land, is exempt, while other businesses conducted on the land, such as Indian craft shops catering to tourists, are not. It is no answer to say that ranching involves the use of grass produced by the land, whereas a motel does not. Ranching involves many other productive elements—labor, improvements, equipment, etc. In fact, some phases of ranching, such as feedlot operations, involve no grass at all; the cattle eat commercial feed only. Unless and until this Court speaks to the question of what land uses are encompassed within the *Capoeman* and *Rickert* tax exemptions, Indians throughout the country will continually be forced to challenge arbitrary IRS rulings disallowing income from different types of land-using businesses.

[20] The Interior Department expressed its separate views in this case in the Justice Department's briefs before the trial judge and the Court of Claims.

1. The Court of Claims' decision, which is adverse to the Interior Department's position, is an unreasonably narrow reading of this Court's decision in *Squire* v. *Capoeman* and is contrary to the congressional policies underlying that decision.

In *Squire* v. *Capoeman*, 351 U.S. 1 (1956), this Court, concurring with Felix Cohen,[21] held that the tax exemption accorded Indian trust land exempted the income derived directly from those lands from federal taxation. The Court pointed out that the purpose of the allotment system and the corresponding tax exemption was to encourage Indians to use their land to attain "a state of competency and independence." *Id.* at 10.

In *Capoeman* the question was whether an Indian's timber sale income was exempt. The Court reasoned that unless the Indian received the full, untaxed income from his timber, which was all his land was useful for, that income would not "be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence" and, further, "he [could] not go forward when declared competent with the necessary chance of economic survival in competition with others." *Id.* at 9-10.

This same reasoning presumably applies in the case of Amy Critzer. Her trust land is unsuited for farming, ranching, or timber or mineral development. How then could she use it to achieve "a state of competency and independence?" She answered this question by using her land as productively as she could, but also by relying upon the other intrinsic attributes of her land—primarily its scenic beauty and proximity to tourist traffic[22]—to

[21] Cohen is the author of *Handbook of Federal Indian Law* (1942), which is probably the leading authority in the area of Indian law.

[22] These are certainly realty attributes of land for which Mrs. Critzer would be compensated if her land were condemned. *See* G. Schmutz and E. Rams, *Condemnation Appraisal Handbook*, 14, 29, 32, 130-32, 136-37, 141-62 (1963).

make her living from the land. The crucial issue thus becomes whether Congress, in conferring the tax exemption, meant for an Indian to be limited to primitive or "raw" uses of his land to earn a living from it, or whether Congress meant that the Indian could make more modern uses of his land consistent with its natural, intrinsic attributes. This important and frequently raised question, of course, is left unanswered by *Capoeman*.

Although the IRS has allowed an exemption for farming and ranching income,[23] no court has directly addressed this critical question in the context of federal taxation until this case. In *Stevens* v. *Comm'r*, 452 F.2d 741 (9th Cir. 1971), the Ninth Circuit, stating that "*Capoeman* is not a technical or narrow decision," 452 F.2d at 744, extended the IRS ruling on farming and ranching income to include farming and ranching on trust land purchased by the Indian, as well as land inherited by

[23] At first the IRS tried to limit *Capoeman* by ruling that it did not extend to proceeds from the sale of cattle raised on an allotment. Rev. Rul. 58-64, 1958-1 C.B. 12. The IRS obviously recognized that cattle ranching is a business which depends heavily not only upon land, but upon labor, capital, and equipment. Two years later, the IRS realized that its 1958 ruling had the effect of denying an exemption to the Indian who ranched cattle on his own allotment, while the Indian who *rented* his land to a third-party cattle rancher enjoyed the exemption because his income was from "rentals" which had been recognized as tax exempt in Rev. Rul. 56-342, 1956-2 C.B. 20. As a result, the IRS liberalized its 1958 ruling to exempt that portion of an Indian's cattle ranching income which was allocable to the grazing rental value of the allotment. Rev. Rul. 60-377, 1960-2 C.B. 13.

By 1962 the IRS recognized the administrative and conceptual difficulties of allocating income between land and other factors, such as labor, capital, and equipment, involved in the cattle ranching business. Consequently, the IRS conceded that *all* of the income received by an Indian cattle rancher on his trust allotments was tax exempt. Rev. Rul. 62-16, 1962-1 C.B. 7. The Service therefore modified Rev. Rul. 56-342 to include income from the sale or exchange of cattle or other livestock within its definition of exempt income.

him.[24] However, since the type of income involved was conceded to be exempt under IRS rulings, the court did not have to analyze Congress' intent on this issue.

The only court to really deal with the crucial issue of Congress' intent in terms of "raw" versus modern uses of trust land has been the Washington State Supreme Court. In two cases involving the application of state and local property taxes to Indian tourist businesses (motels), the Court concluded that Congress intended that Indians would develop business enterprises on their allotments.[25] In *Makah Tribe* v. *Clallam County*, 73 Wash.2d 677, 440 P.2d 442 (1968), the court stated:

> As we understand federal policy, it is as much the government's desire to foster successful business enterprises on the reservations as it is to encourage farming, ranching and fishing.[26]

The trial judge in this case, like the Ninth Circuit and the Washington Supreme Court, interpreted *Capoeman* liberally, pointing out that this Court "was not establishing a test whereby income is tax exempt only if it is derived from 'raw land.' " [27] The Court of Claims however, construed *Capoeman* technically and narrowly in denying an exemption. It listed a series of hypothetical situations—a "parade of horribles"—which it felt would

[24] The IRS acquiesced in this decision in Rev. Rul. 74-13, 1974-1 C.B. 14.

[25] In another case involving whether an Indian's income from ranching on grazing units (*i.e.*, not the Indian's own land) was exempt from federal taxes, the Montana Federal District Court relied heavily upon the congressional policy behind allotments and the uselessness of the Indian's own land in holding that his income was exempt. *United States* v. *Anderson*, 442 F. Supp. 10, 13 (D. Mont. 1977).

[26] 440 P.2d at 447. *Accord*, *Sohol* v. *Clark*, 78 Wash.2d 813, 479 P.2d 925, 929 (1971).

[27] App. at A-15.

result if an exemption were allowed for business income.[28] The issue, however, was whether income from Mrs. Critzer's use of the *natural, intrinsic attributes of her land* (and where the land was unsuited for "raw" uses) was tax exempt, and not whether uses having little or nothing to do with the natural, intrinsic attributes of the land would be tax exempt.

The Interior Department, as the agency responsible for carrying out the federal Indian policy, has taken the position throughout this case that income such as Mrs. Critzer's is exempt from federal taxes.[29] Although its view is "entitled to great weight and is not to be overturned unless clearly wrong," [30] the Court of Claims never even mentioned Interior's view and referred throughout its opinion to "the Government's position" or "defendant's position" as if "the Government" was the Justice Department alone.

This Court should review this case and settle the important question left open in *Capoeman* of whether Congress intended to exempt from taxation income derived from modern uses consistent with the natural, intrinsic attributes of an Indian's trust land, and, if so, whether Mrs. Critzer's use is such a use.

2. The tax status of an Indian's income from his own trust land affects Indians on virtually every reservation throughout the country and the question will constantly recur in different contexts until authoritatively settled by this Court.

The issue of the nature of income derived from an Indian's own trust land which is exempt from federal taxes is a question affecting Indians on almost every

[28] App. at B-11 - B-12.

[29] *See* note 20, *supra*.

[30] *Northern Cheyenne Tribe* v. *Holiowbreast*, 425 U.S. 649, 660 (1976); *Stevens* v. *Comm'r*, 452 F.2d 741, 746 (9th Cir. 1971).

reservation throughout the United States. Since the Government conceded for purposes of the appeal in this case that individual possessory holdings on the Eastern Cherokee Reservation are the same as allotments on other reservations,[31] the Court of Claims' decision affects perhaps 70,000 allotments [32] consisting of 10,127,204 acres.[33] While many Indian allottees have land that is suitable for farming, ranching, timber production, or mineral development, many others, such as the Eastern Cherokees, do not. If they are to achieve the federal purpose of becoming self-sufficient through the use of their land, these latter Indians must look to other uses of their land.

This fact was recognized by Congress when it passed the Indian Financing Act of 1974 [34] authorizing grant and loan aid for Indian businesses. That Act provides:

> It is hereby declared to be the policy of Congress to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical

[31] Although the tax exemption clauses in various Indian allotment statutes differ, courts have regularly construed them *in pari materia* with the General Allotment Act involved in *Capoeman*. *See Stevens* v. *Comm'r*, 452 F.2d 741 (9th Cir. 1971); *United States* v. *Hallam*, 304 F.2d 620 (10th Cir. 1962); *Big Eagle* v. *United States*, 156 Ct. Cl. 665, 300 F.2d 765 (1962); *Kirkwood* v. *Arenas*, 243 F.2d 863 (9th Cir. 1957).

[32] This is the best estimate available based upon a 1960 study of the heirship problem on Indian allotments which found that there were 76,721 trust allotments in the United States. Indian Heirship Survey of the 86th Cong., 1st Sess., Pt. 2, Memorandum of the Chairman to the Senate Comm. on Interior and Insular Affairs, at IX (1960). As of the time of that survey, over half of the allotments were in heirship status, and about half of these had six or more heirs. Thus, although there is no precise figure available, the number of individual Indians owning interests in trust allotments today is probably in the hundreds of thousands.

[33] American Indian Policy Review Commission Final Report on Reservation Resource Development and Protection, Vol. I, at 23 (1976), shows that there are 10,127,204 acres of land in the United States held in trust for individual Indians.

[34] Pub. L. No. 93-262, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.*

and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.[35]

The House report on this bill stated: *"If the long-sought goal of Indian self-sufficiency is to be reached, [this] financial assistance must be provided or facilitated."* [36] Thus, Congress was clearly reaffirming the purpose of the original allotment acts, and the corresponding tax exemption, to bring Indians to a state of economic self-sufficiency, and recognizing that "raw" or primitive uses of the land would not achieve this goal.

The House report pointed out that *"The purpose of the [Indian Business Development Program] is to provide 'seed money,' nonreimbursable grants to Indians and Indian tribes to become established in small business entrepreneurship."* [37] Under this program, millions of dollars have been granted and loaned to individual Indians to develop and improve businesses on their trust land. These have included motels, bars, restaurants, Indian craft shops, trailer parks, fishing camps, farms, ranches, country stores, etc.[38] Many of these are obviously tourist-oriented and, indeed, several of the grants have been made to Indians for craft shops and motels on the Eastern Cherokee Indian Reservation where Mrs. Critzer's businesses are located. It would be hard to understand why Congress would give Indians assistance

[35] 25 U.S.C. § 1451.

[36] H.R. Rep. No. 93-907, 88th Cong., 2d Sess. 7 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 2873, 2874 (emphasis added).

[37] *Id.* at 8, [1974] U.S. Code Cong. & Ad. News at 2875 (emphasis added).

[38] Information provided by Thomas Burden, Credit Officer, Bureau of Indian Affairs.

to become self-sufficient on their land in modern business enterprises and expect that income to be treated differently than farming or ranching income in terms of taxation.

Although Mrs. Critzer did not avail herself of the Indian Financing Act, she did exactly what Congress intended when she sought to exploit what *are* the natural, intrinsic attributes of her land—its scenic beauty and proximity to major highways—and used her land to make a living catering to tourist traffic. Now that a few Indians like Mrs. Critzer have begun to make a decent living from their land, they have attracted the attention of the IRS which has sought to draw the line on the tax exemption and limit it to farming and ranching activities, despite expressly recognizing that these latter businesses are as dependent upon labor, capital, and equipment as any other.[39] Such an issue which affects the livelihood of so many Indians should not be left to the arbitrary whims of the IRS. This Court should decide, once and for all, whether Congress intended for the tax exemption to be limited to primitive or "raw" uses of Indian land or to apply to more modern uses consistent with the land's natural, intrinsic attributes, and, if the latter, whether Mrs. Critzer's use is exempt. Until these issues are finally resolved by this Court, Indians will continue to have to fight niggardly IRS rulings and face litigation over the question of whether their particular use of their trust land is exempt, even if it is the same as Mrs. Critzer's.[40]

[39] *See* Rev. Rul. 62-16, 1962-1 C.B. 7. In some phases of ranching, the land contribution may be merely its physical space. For example, in a cattle feed-lot operation, there is no grass; the cattle are fed solely on commercial feeds. On a modern chicken farm, the chickens' feet may never touch the ground; they are kept in modern, climate-controlled sheds from egg to axe.

[40] This issue can be relitigated because tax refund suits can be filed in any appropriate federal district court and those courts need

3. The Court of Claims' decision is in conflict with federal Indian policy and this Court's decisions in the *Rickert*, *Capoeman*, and *Mescalero* cases.

This Court, in 1903, in *United States* v. *Rickert*, 188 U.S. 432, established a fundamental principle of Indian tax law: that the tax exemption for Indian trust land on a reservation applies equally to permanent improvements and personal property on the land *because all are needed for the Indian to achieve the congressional purpose of using the land to earn a living.*

The Court of Claims held that the *Rickert* principle did not apply to Mrs. Critzer's improvement income (*i.e.*, that part of her income attributable to the improvements) because *Rickert* involved a property tax, not an income tax.[41] This distinction, however, completely misses the whole point of the *Rickert* case:

> Looking at the object to be accomplished by allotting Indian lands in severalty, it is evident that Congress expected that the lands so allotted would be improved and cultivated by the allottee. But that object would be defeated if the improvements could be assessed and sold for taxes. . . . Every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements.
>
> . . . The fact remains that the improvements here in question are essentially a part of the lands, and their use by the Indians is necessary to effectuate the policy of the United States.[42]

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not follow the decision of the Court of Claims. The issue is already present in Mrs. Critzer's case in the Tax Court, which also need not follow the Court of Claims' ruling.

[41] App. at B-13.

[42] 188 U.S. at 442. The trial judge quoted this same language. App. at A-13.

Thus, it was not the type of tax that was critical in *Rickert*, but rather the use of the improvements to effectuate congressional policy.[43] This very point—the federal policy of making the Indian self-sufficient—was forcefully repeated in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), where this Court applied a land tax exemption to exempt *income*, referring to the policy of allotting land to the Indians as "the purpose of bringing him finally to a state of competency and independence." 351 U.S. at 10.

The Court of Claims also thought that *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), justified denying the income tax exemption for Mrs. Critzer. In that case, this Court struck down a state use tax upon a tribally owned ski lift on off-reservation trust land, but allowed a state gross receipts tax. This Court relied upon the same policy rationale as in *Rickert*—the use of the improvements with the land to effectuate the federal policy—in voiding the use tax.[44] However, the Court of Claims seized upon the allowance of the gross receipts tax as indicating that this Court (and Congress) meant to draw a distinction between property and income taxes.[45] Even a cursory reading of *Mescalero*, however, clearly demonstrates that this is false. The reason for the allowance of the gross receipts tax was that the ski resort was located on land *outside* the boundaries of the reservation. This Court went to great lengths to show why off-reservation income could be taxed while on-reservation income

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[43] Mrs. Critzer's improvements could presumably be seized and sold by the IRS under 26 U.S.C. §§ 6331-6340 just as the improvements in *Rickert* could conceivably have been seized and sold. How then could she have used her improvements to effectuate the federal policy?

[44] 411 U.S. at 158.

[45] App. at B-14.

could not; indeed, this was the thrust of the entire opinion.[46]

The Court of Claims totally failed to recognize this basic principle or the congressional policy underlying the exemption for improvements as well as bare land. Its decision is in conflict with *Rickert*, *Capoeman*, and *Mescalero*, and until corrected by this Court will be the justification for the IRS demanding income taxes from individual Indians on their income from their improved trust land, other than income from farms and ranches which paradoxically the IRS concedes is exempt.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 17, 1979

[46] 411 U.S. at 147-58. The Court of Claims never mentioned this critical distinction at all.

Appendices

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS
TRIAL DIVISION

No. 134-75

(Filed Jul 12 1977)

AMY T. CRITZER

v.

THE UNITED STATES

Charles A. Hobbs, attorney of record, for plaintiff. *Wilkinson, Cragun & Barker, Herbert E. Marks, Jerry R. Goldstein, Coward, Coward, Jones & Dillard, Orville D. Coward*, and *Roger L. Dillard*, of counsel.

Patricia B. Tucker, with whom was *Acting Assistant Attorney General Myron C. Baum*, for defendant. *Theodore D. Peyser* and *Gilbert W. Rubloff*, of counsel.

OPINION*

BERNHARDT, *Trial Judge*: This case considers whether rental and operating income received in 1971 by a "non-competent" Indian [1] member of the Eastern

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* The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

[1] An Indian who is mentally acute and competent in the ordinary legal sense may be nominally noncompetent with regard to statu-

Band of Cherokees from permanent improvements constructed on her three possessory holdings on reservation land is exempt from federal taxation. It is.

Plaintiff, a three-quarter blood enrolled member of the Eastern Band of Cherokee Indians, was born in 1911 on the Tribe's Reservation in western North Carolina. After a 20-year absence she returned in 1953 to live on the Reservation. She and her sister inherited a possessory interest in a parcel of land on the Reservation from their father. By purchase and inheritance she had acquired two other possessory interests in reservation land. Plaintiff's land holdings have been recognized by tribal resolutions, and eventually confirmed by Certificates of Possessory Holding issued after 1960.

Starting in 1953 with a neglected 6-unit motel on her late father's holding, and dilapidated structures on the two other possessory holdings, through industry and frugality over the ensuing years the plaintiff transformed the motel into a modern 50-unit hostelry with a large restaurant and gift shop, which she operated, and replaced the structures on the other two holdings with two gift shops and four apartments above one, all of which she leased to others. The improvements cost in excess of $383,000. Except for a $10,000 personal loan, all improvement costs were financed through profits. Possessory holdings are not acceptable security for mortgage financing.

During 1971 the plaintiff received income from operation of the motel and restaurant, from leases of the two other gift shop properties, and from bank interest and

tory restrictions on his right to alienate, devise, or encumber his real property. The late Charles Curtis, although a distinguished United States Senator and later Vice President of the United States, was nonetheless technically a noncompetent Indian incapable of deeding or devising his trust property without approval of the Secretary of the Interior. Department of Interior, FEDERAL INDIAN LAW, p. 553 (1958).

stock dividends. She concedes the taxability of the interest and dividends, but contests the taxability of the other 1971 income which she reported and paid in the amount of $8,941.59, and filed a claim for refund. The Internal Revenue Service (IRS) assessed a deficiency of $4,286.22, in addition to $1,304.32 and $1,032.22 in penalty and interest, respectively, for which the defendant counterclaims in the total amount of $6,622.76.

In a criminal tax fraud proceeding brought by the Department of Justice against plaintiff in the Western District of North Carolina, wherein the Department of the Interior supported Mrs. Critzer's position that the income in issue was tax exempt, the Circuit Court of Appeals dismissed the charge on a finding of lack of criminal intent as evidenced by the inter-agency conflict as to tax liability, without reaching the tax exemption issue itself.[2] *United States* v. *Critzer*, 498 F.2d 1160 (4th Cir. 1974). Plaintiff has pending in the Tax Court the same tax exemption issue as to the years 1963-70, and 1972-73 (Tax Court Docket No. 10226-75). These pend resolution of this case.

All of the land in the Reservation is owned by the United States in trust for the Tribe pursuant to the Act of June 4, 1924, ch. 253, 43 Stat. 376, 25 U.S.C.A. § 331 (note). That Act contemplated the allotment of reservation lands to individual members of the Tribe for their use, with restriction on alienation for 25 years, or less if ordered by the Secretary of the Interior. This was consistent with the purposes of the General Allotment Act of February 8, 1887, ch. 119, 24 Stat. 388, 25 U.S.C. § 331, *et seq.* Section 21 of the 1924 Act provided that "all restricted allotments and undivided property shall

[2] The Department of the Interior has filed here a brief as *amicus curiae* adhering to its previously announced view that the income is exempt from taxation. As the agency chiefly responsible for Indian programs, its views are entitled to great weight. *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 660 (1976).

be exempt from taxation" until the restrictions are removed or title of the Band is extinguished.

Before any allotments were made under the 1924 Act the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. § 461, *et seq.*, was enacted halting further allotments on those Indian Reservations which subscribed to the Act, as did the Eastern Cherokees. All lands today within the Cherokee Reservation remain titled in the United States in trust for the Tribe. About 85 percent of the approximately 56,000 acres comprising the Reservation is parcelled out to individual tribal members (about 1,200 families) in the form of possessory holdings under the Tribal Realty Code; the rest is reserved for tribal use. The individual possessory holdings, which are tribally recognized by Certificates of Possessory Holding, are used by the owners for homesites, limited farm and forestry activities, and commercial (mostly tourist) purposes.

As a fall-back defense the Government makes a legal distinction between possessory holdings and allotments with respect to federal taxability, but sees only conditional need to resolve this argument since in its opinion the 1924 Act confers no tax exemption in this instance. It prefers to confront the ultimate issue as to whether the type of income which plaintiff received, even if on allotted lands, is immune from tax merely because of its location and the taxpayer's status as a noncompetent Indian.

The scheme of the General Allotment Act of 1887, *supra, as amended* (Acts of February 28, 1891, ch. 383, 26 Stat. 794, and June 25, 1910, ch. 431, 36 Stat. 855), was that after passage of a specified period the allottee would be issued a fee title to his allotment, "discharged of said trust and free of all charge or incumbrance whatsoever" (Sec. 5). Thereafter "all restrictions as to sale, incumbrance, or taxation of said land shall be removed."

(Sec. 6). The purpose of the Act was to give each Indian a small parcel of land so that he could become economically self-sufficient and gradually emerge into the mainstream of American society. Despite its altruistic purposes the allotment system ultimately failed in practice because many Indians whose allotments ripened into fees would sell their land to non-Indians, which often left the sellers landless and impoverished and adversely affected unity of reservations. Department of the Interior, FEDERAL INDIAN LAW, *supra*, pp. 253-58. To curb these untoward consequences Congress in 1934 enacted the Indian Reorganization Act, ch. 576, 48 Stat. 984, 25 U.S.C. § 461 *et seq.* (1970), which for practical purposes terminated the allotment system.

The effect of the 1934 Act on the Eastern Cherokee Reservation was to prevent allotments promised under the 1924 Act. The Tribe thereafter issued to its various members Certificates of Possessory Holding for selected parcels which gave the holder the use of the assigned parcel to approximately the same extent and effect as an allotment under the 1887 Act, except that a possessory holding could never ripen into a fee estate but would always remain titled in the United States in trust for the Tribe, which in turn distributed possessory holdings under regulations prescribed by the Tribal Realty Code.

With permission of the Tribe and the Secretary of the Interior possessory holdings may be leased. The Tribe receives 30 percent and 20 percent, respectively, of rentals from commercial leases and leases of improved land. Possessory holders own 90 percent of mineral rights, and the Tribe the balance. The Tribe reserves the right and bears the duty of controlling leasing, transfer, and inheritance of possessory holdings, as well as mineral leases, permits, income allocation, and timber-cutting. It also controls easements and rights-of-way over holdings, land zoning, type and nature of use. The Certificate holder

may, with tribal permission, construct residential and commercial improvements, sue for destruction of improvements or for damages to the holding by easements or mineral permits granted by the Tribe. He may, with tribal permission, transfer his holding to another member, and lease to a member or non-member for a specific period and consideration under rules of the Tribe and the Bureau of Indian Affairs (BIA). Inheritance of holdings by members is governed by North Carolina law. Non-member spouses of deceased holders retain life use rights. Improvements are considered to be personal property and are inherited according to State law. If improvements pass to non-members the Tribe has the option to purchase them or allow the non-member to lease them until the value is amortized in rents. The BIA treats possessory holdings in essentially the same way as it does trust allotments or other reservations as to supervision, transfer, descent and distribution, use, and development, except as previously noted that, unlike allotments, possessory holdings may not graduate into fee ownership without Congressional enactment.

The lands of the Eastern Cherokee Reservation are not suited generally for agricultural, grazing, or timber pursuits. They are uniquely scenic, situated as they are bordering the Great Smoky Mountains National Park, surrounded by mountains and coursed by streams. Because of this by 1972 some 170 tourist-oriented businesses had been developed on the Reservation to constitute the chief source of the tribal economy and employment during the brief annual tourist season. The BIA fosters these tourist potentials, and promotes other programs for the educational, economic, and social betterment of the members, in order to facilitate their total emancipation.

The plaintiff's holdings are a case in point. They lend themselves neither to farming, ranching, nor timber production. Located on or near a major highway their highest, best, and only use is precisely that to which they have been put, namely, to cater to the passing tourist trade during the fleeting season each year.

We start with the basic proposition that statutes passed for the benefit of Indians "are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976.) There is no doubt that the 1924 Act intended plaintiff's lands to be exempt from taxation so long as restrictions on their alienation remained. In 1925 to further the purposes of the 1924 Act, the Tribe conveyed the reservation lands to the United States in trust pursuant to the tribal resolution of November 6, 1919, adopted to protect the members' interests as in the case of Indians on reservations elsewhere. (Finding 32.) The Fourth Circuit noted that "Congress has expressly exempted the lands in question from taxation." *United States* v. *Wright*, 53 F. 2d 300, 311 (4th Cir. 1931), *cert. denied*, 285 U.S. 539 (1932).

An Indian's technical status as a noncompetent is not by itself a ground for income tax exemption. *Superintendent of Five Civilized Tribes* v. *Comm'r.*, 295 U.S. 418 (1935) (income on invested funds derived from restricted allotment); *Holt* v. *Comm'r.*, 364 F. 2d 38 (8th Cir. 1966), *cert. denied*, 386 U.S. 931 (1967) (income from ranching on tribal land under tribal license); *Comm'r.* v. *Walker*, 326 F. 2d 261 (9th Cir. 1964), *rev'g. in part* 37 T.C. 962 (1962) (income earned as tribal treasurer). Federal revenue laws are of general applicability. Indians are subject to them, whether competent or otherwise. At one time Indians were not subject to general laws unless specifically provided; however, general statutes applying to all persons by their terms now are applicable to Indians. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960); *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 606-08 (1943);

Superintendent of Five Civilized Tribes v. *Comm'r.*, *supra*, at 420-21. Tax exemptions are not to be implied lightly; they must be stated specifically. *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956); *Oklahoma Tax Commission* v. *United States*, *supra*, at 606; *Superintendent of Five Civilized Tribes* v. *Comm'r.*, *supra*, at 420. The Internal Revenue Code contains no income tax exemptions for Indians. They must be found, if at all, in applicable statutes and treaties. *Rev. Rul.* 67-284, 1967-2 C.B. 55 (1954 Code); *Rev. Rul.* 54-456, 1954-2 C.B. 49 (1939 Code).

The plaintiff relies on tax exemption language both in the General Allotment Act of 1887 (25 U.S.C. § 331 *et seq.*), and the Cherokee Allotment Act of 1924 (Act of June 4, 1924, ch. 253, 43 Stat. 376), 25 U.S.C.A. § 331 (note).

The former provides in Section 5 that when the period of restriction on alienation expires the allottee will be given a fee patent to the land "free of all charge or incumbrance whatsoever", and Section 6 provides that after the issuance of a fee patent "all restrictions as to sale, incumbrance, or taxation of said land shall be removed." The Cherokee Allotment Act of 1924 provides in Section 21 that "all restricted allotments * * * shall be exempt from taxation" until removal of the restrictions on alienation. The Cherokee Allotment Act of 1924 is to be read *in pari materia* with the General Allotment Act of 1887, as have been other special allotment acts concerning other tribes. *Stevens* v. *Comm'r.*, 452 F. 2d 741 (9th Cir. 1971); *Hayes Big Eagle* v. *United States*, 156 Ct. Cl. 665, 300 F. 2d 765 (1962); *United States* v. *Hallan*, 304 F. 2d 620 (10th Cir. 1962); *Kirkwood* v. *Arenas*, 243 F.2d 863 (9th Cir. 1957). The tax exemption provision in the Cherokee Allotment Act of 1924 is more explicit than that in the General Allotment Act of 1887.

The plaintiff contends that the statutory tax exemption in the 1924 Act applies not only to the land itself but also to taxation of income derived from the land. *Squire* v. *Capoeman*, 351 U.S. 1 (1956), involved the taxability of capital gains from the sale of timber on the allotted land of noncompetent Quinaielt Indians. It was held that Section 6 of the General Allotment Act, *as amended* (25 U.S.C. § 349 (1970)), which provided that restrictions on taxation of allotted land would be removed upon issuance of fee title to the allottee, applied the tax exemption not only to the land but to income derived directly therefrom. Recognizing that tax exemption language must be explicit, it stated however that doubtful expressions should be construed in favor of "weak and defenseless wards of the nation." *Id.* at 6-7. That the provision under consideration antedated the federal income tax was held to be irrelevant, since Congress did not intend to undermine the purpose of the tax exemption for promoting the economic survival of the Indian with the enactment of the income tax. *Id.* at 10.

As its secondary defense, the defendant distinguishes possessory holdings from trust allotments with regard to income tax exemption. No cases directly deal with the taxability of income from possessory holdings. Most precedents involve the taxability of income from trust or restricted allotments, mineral headrights (*i.e.*, member's share of tribal mineral income), and lands leased from the tribes. A possessory holding is not an allotment, but possesses all of its significant attributes except that allotments are temporary in nature (terminating upon issuance of fee title), and possessory holdings are permanent and can never ripen into fee title. The Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. § 461 *et seq.* (1970), abolished trust allotments in order to preserve the integrity of tribal reservations and protect Indians from squandering the proceeds from sale of their fee patented lands and becoming public charges. No al-

lotments had been made under the Cherokee Act of 1924 by the time the Eastern Cherokees accepted the 1934 Act, and none were made thereafter. Instead, possessory holdings of individuals on the Reservation were recognized by tribal resolutions under the Tribal Realty Code, and after 1960 Certificates of Possessory Holding were issued by the Tribe in confirmation.

It is the defendant's position that the temporary nature of allotments is a critical distinction between them and possessory holdings, since the tax exemption status of income from allotments ended when the allotment was converted into a fee patent, so the intention of Congress was to confer a tax exemption as to allotments on a time limited basis, and no comparable purpose could be construed as to possessory holdings which are permanent in duration. While many allotments lost tax exemption status by conversion to fees, it is also true that the period of restriction on alienation as to others was indefinitely extended by the Indian Reorganization Act of 1934, ch. 576, § 2, 48 Stat. 984, 25 U.S.C. § 462 (1970), in order to protect allottees and preserve the unity of reservations, and in these latter instances the tax exemption status was correspondingly prolonged. Moreover, since the 1934 Act, ch. 576, § 1, 48 Stat. 984, 25 U.S.C. § 461, prohibits any further allotments as to tribes accepting its provisions, since 1934 the principal distinction between allotments and possessory holdings has permanently disappeared, and with it any reason to discriminate as to tax exemption.

Few cases have dealt with income derived from tribal lands rather than allotted lands. They presented no applicable treaty provision or statute exempting the income.[3]

[3] *Bentley L. Holt*, 44 T.C. 686 (1965), *aff'd.*, 364 F. 2d 38 (8th Cir. 1966), *cert. denied*, 386 U.S. 931 (1967) (income from tribal grazing lands used for grazing under permit from Tribe); *Bryan L. Stevens*, 52 T.C. 330 (1969), 54 T.C. 351 (1970), *aff'd.*, 452 F. 2d 741 (9th Cir. 1971) (Tax Court following *Holt* on same issue); *Charles Strom*, 6 T.C. 621 (1946), *aff'd per curiam*, 158 F. 2d 520 (9th Cir. 1947) (pre-*Capoeman* decision involving income derived by Indian from fishing rights allocated to taxpayer on tribal land).

However, in *Hayes Big Eagle* v. *United States*, *supra*, it was held that the "headrights" interests of noncompetent Osage Indians in the tribal income from mineral rights were not subject to the federal income tax. Congress had amended the Osage Allotment Act so that:[4]

> * * * *all* royalties and bonuses arising therefrom [the Osage mineral lands] * * * *shall* be disbursed to members of the Osage Tribe or their heirs or assigns as now provided by law * * *. [Emphasis in original.]

The court felt that this was analogous to language in Section 5 of the General Allotment Act providing that at the end of the trust period the allotment should be conveyed in fee to the allottee "free of all charge or incumbrance whatsoever." The purpose of both acts was the same, to protect the property of the Indian ward so that he ultimately might be brought to a stage of competency and independence. If the funds were subject to taxation, not all of the funds would be turned over to the allottees and the purpose of the trust would be to some extent frustrated.[5] Therefore the income was not subject to taxation.

Here the Cherokee Allotment Act of 1924 provides that "all restricted allotments and undivided property

[4] Osage Allotment Act of June 28, 1906, ch. 3572, 34 Stat. 539, *as amended* by Act of March 2, 1929, ch. 493, § 1, 45 Stat. 1478-79; Act of June 24, 1938, ch. 465, § 3, 52 Stat. 1035-36.

[5] *Hayes Big Eagle* v. *United States*, 156 Ct. Cl. 665, 678, 300 F. 2d 765, 771-72 (1962).

The issue was the same as in *Blackbird* v. *Comm'r.*, 38 F. 2d 976 (10th Cir. 1930), a companion case to *Chouteau* v. *Comm'r.*, 38 F. 2d 976 (10th Cir. 1930), *aff'd. sub nom. Choteau* v. *Burnet*, 283 U.S. 691 (1931).

shall be exempt from taxation." [6] Plaintiff's possessory holdings are on undivided tribal land. Given the wording of this statute and the *Capoeman* precedent, it is clear that in this instance income derived from a possessory holding on tribal land is not subject to the federal income tax.[7]

The defendant contends that plaintiff's income is derived mainly from improvements built by plaintiff on the land and is not "derived directly from" the land; therefore, it is subject to the federal income tax.[8] I demur.

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[6] Cherokee Allotment Act of June 4, 1924, ch. 253, § 21, 43 Stat. 381. It might be noted that the General Allotment Act does not refer to the taxability of tribal lands.

[7] In *Holt*, 364 F. 2d at 41, the court distinguished *Capoeman* on the ground that the purpose of the exemption was to allow the delivery of the land to the allottee free of any encumbrances. In that case there was no statute or treaty conferring any right to the taxpayer to acquire title. Moreover, the tribal constitution did not grant the taxpayer the right to acquire title, nor did he have an "enforceable right in tribal property."

Although the plaintiff in the instant case may not have the right to acquire title, she does have an enforceable right in the use of her possessory holding. *Crowe* v. *Eastern Band of Cherokee Indians, Inc.*, 506 F. 2d 1231 (4th Cir. 1974).

Taxation of the income from the land could present a potential burden or encumbrance upon the improvements in the land. I.R.C. § 6334(c) subjects to levy every type of property not specifically exempted under I.R.C. § 6334(a), which has no exception applicable here. Arguably, the right to use a possessory holding is also property under the statute.

But cf. United States v. *Rickert*, 188 U.S. 432 (1903), (held that the tax exemption under the General Allotment Act applied to improvements on the land in connection with state property tax).

[8] In *Rev. Rul.* 67-284, 1967-2 C.B. 55, 56-57, the Internal Revenue Service announced a five-part test for determining the tax-exempt status of income received by an enrolled member of an Indian tribe:

(1) the land must be held in trust by the United States;

(2) the land is restricted and allotted and held for the individual, non-competent Indian rather than the tribe;

[Footnote continued on page A-13]

Congress' purpose in providing the tax exemption would not be realized by restricting it solely to income derived from "raw land", as the defendant urges.

In *United States* v. *Rickert*, 188 U.S. 432 (1903), the Supreme Court held that the tax exemption of the General Allotment Act applied not only to the land itself but also to improvements such as a house and barn, on which tax assessments had been made by the county in which they were located. The court stated:

> Looking at the object to be accomplished by allotting Indians lands in severalty, it is evident that Congress expected that the lands so allotted would be *improved and cultivated* by the allottee. But that object would be defeated if the improvements could be assessed and sold for taxes. The improvements to which the question refers were of a permanent kind. While the title to the land remained in the United States, the permanent improvements could no more be sold for local taxes than could the land to which they belonged. *Every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements.* [Emphasis added.] *Id.* at 442.

The fact that plaintiff in financing her improvements reinvested much of her own income does not bring the

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[8] [Continued]

(3) the income must be "derived directly" from the land;

(4) the statute, treaty, or authority evinces Congressional intent that the allotment be used to protect the Indian until he attains competency;

(5) the language of the authority in question indicates clear Congressional intent that the land is not to be taxed until conveyed in fee simple to the allottee.

All of the five tests must be met. The ruling also noted that in the absence of a treaty or statute income derived directly from unalloted tribal lands by a member of the Tribe is subject to the federal income tax.

instant case within the holding of *Superintendent of Five Civilized Tribes* v. *Comm'r., supra.* There the income derived from tax-exempt properties had been reinvested, and interest had been earned on that income. The interest was held not to be exempt from the federal income tax.[9]

The difference is clear. In the instant case the plaintiff is utilizing to its best advantage the land that Congress has declared to be tax exempt. Such utilization clearly falls within the Congressional intent that Indians improve themselves economically so that they may take their rightful place in civilized society.[10] As pointed out in *Rickert*, Congress expected the Indians to improve the land. Congress scarcely intended the tax exemption to be an incentive to the Indians to use their lands in the most primitive ways possible, so that the income derived therefrom would be "derived directly" from "raw land" and therefore tax exempt. The exemption was not granted

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[9] Note that Mrs. Critzer concedes the taxability of interest on her bank deposits.

[10] *Cf. Sohol* v. *Clark*, 79 Wash. 2d 813, 479 P. 2d 925 (1971); *Makah Indian Tribe* v. *Clallam County*, 73 Wash. 2d 677, 440 P. 2d 442 (1968) (motel, cabins, and restaurant located on land purchased for Indians and on leased tribal land held not subject to state property tax).

In *Sohol*, the court adopted the *Rickert* rationale and noted:

> This noncompetent Indian's property was acquired through the direct investment of restricted funds derived from the Bureau's sale of timber on her allotted trust patent lands, and was maintained and developed through her own work, energy, ingenuity, savings and borrowing. This is but the modern equivalent usage of the cows, the horses and the wagons in *Rickert*. It is as much the policy of the federal government to foster successful businesses on Indian reservations through the direct investment of a noncompetent Indian's restricted funds; and it is as much the policy of that government to encourage hard work, ingenuity and independence in such Indian business ventures as it is to encourage farming and fishing in an effort to adapt land to the use for which it is best suited. [Citations omitted.] 479 P. 2d at 929.

by Congress in order to foster economic backwardness among the Indians.

The *Capoeman* court in differentiating the "reinvestment income" involved in *Superintendent of Five Civilized Tribes* v. *Comm'r., supra,* from income "derived directly" from land was not establishing a test whereby income is tax exempt only if it is derived from "raw land."

The converse is the case. The exemption in regard to income from the land is intended "to prepare the Indians to take their place as independent, qualified members of the modern body politic." *Squire* v. *Capoeman*, 351 U.S. 1, 9. The question is whether the land held by the Government for the Indians is being utilized by the Indians for their advancement in society. That is the nexus with the tax exemption, not the primitiveness of use of the land.[11] The *Capoeman* court, in referring to income "derived directly" from the land, was distinguishing it from "reinvestment income" earned on funds not at all involved in subsequent investment in the land.

In *Capoeman*, the court pointed out that the timber on the land which had been logged and sold constituted the major value of the land. 351 U.S. at 10. In the instant case, plaintiff's possessory holdings have little value for agricultural or ranching pursuits. In fact, the Cherokee Allotment Act of 1924 did not restrict the making of allotments only to land suitable for graz-

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[11] In *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), the Supreme Court held that a ski lift permanently attached to land located outside of a reservation on land exempt from state and local taxation was not subject to a state use tax. The court noted:

> But use of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former. *Id.* at 158.

ing or agriculture, unlike the General Allotment Act, presumably because the land is so poor.[12] The plaintiff is utilizing her possessory holdings to their best use. Such use does not fall outside the scope of the tax exemption.

And so it seems Mrs. Critzer became too rich too fast to suit the state gatherer.[13] Had her profits been those of a humble Indian farmer or cattle grazer, there is little reason to feel that she would have aroused the Collector's appetite, and the defendant's implausible distinction between possessory holdings v. trust allotments as to tax exempt status, or its argument as to reinvestment income, would never have reached the court. If a legal lesson were to be drawn from Mrs. Critzer's tax predicament, it would be that where restricted reservation land, whether a possessory holding or a trust allotment, is put by its owner to its highest, best, and most natural use, whether that be farming, grazing, timber sales, or tourist-oriented enterprises, and whether the income directly derived therefrom is squandered, consumed in subsistence, or thriftily devoted to increasing the income base, no foundation for denial of a tax exemption exists so long as a statute or treaty expressly or by reasonable implication provides such an exemption, as it does in this instance. It is always within the legislative prerogative to terminate the exemption. Until that occurs the plaintiff's income remains immune from taxation. She should not be penalized for achieving the status of self-sufficiency which the official Indian program has always fostered.

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[12] General Allotment Act of February 8, 1887, ch. 119, § 1, 24 Stat. 388; Cherokee Allotment Act of June 4, 1924, ch. 253, § 4, 43 Stat. 377.

[13] The late Charles Lamb caricatured—Lampooned as it were—the tax collector in these unflattering terms:

> * * * your sour parochial or state gatherers—those inkhorn varlets, who carry their want of welcome in their faces!

Of course, we do not subscribe to this lack of charity.

FINDINGS OF FACT

1. This is an action for the refund of federal income taxes in the amount of $8,941.59 for 1971. The Government counterclaims for $6,622.76 in additional taxes, interest, and penalties. The issue of tax exemption has been severed for initial decision.

2. Plaintiff, Amy Tahquette Critzer, is a three-quarter blood noncompetent Cherokee Indian and an enrolled member of the Eastern Band of Cherokee Indians. She was born on the Eastern Cherokee Reservation in 1911 and presently resides there.

3. In 1952 plaintiff married a non-Indian. In April 1953, after a 20-year absence while training and serving as a registered nurse, plaintiff returned to the Reservation. Until his death in 1966 Mr. Critizer worked without salary for plaintiff in her various business enterprises.

4. Upon returning to the Reservation in April 1953, plaintiff had about $1,000 and some Armour stock inherited from her father. She began to operate a six-unit motel, called the Cool Waters Motel, in partnership with her twin sister, Marion T. Parton. The reservation land underlying the motel had been held by Mrs. Critzer's father until his death in 1934, leaving his interest in equal shares to plaintiff and her sister. In December 1953 Mrs. Parton died, leaving her half interest in the land and improvements to plaintiff.

5. A disagreement arose in the mid-1950's concerning ownership of a small portion of undeveloped land adjoining the motel. Rather than becoming involved in legal proceedings with respect to this parcel plaintiff purchased it for $250. She cleared the parcel and constructed a small fish pond for motel guests.

6. When plaintiff returned to the Reservation in 1953 the partly constructed motel had been in disuse for

about 30 years and lacked proper furniture and facilities. It was situated on a main highway among beautiful mountains and a scenic creek, and was favorably located for tourist traffic.

7. Plaintiff and her husband lived in the motel office and began improvements to the property, first clearing the stoney and overgrown land, and using the stone from the land to face the motel front, line a flower bed, and build a stone fence. They used the sand and gravel from the land in constructing the flooring for the motel. They tried to plant trees and shrubs on the property, but the land was too rocky and sandy to grow anything. Therefore they hauled good soil from a nearby mountain to plant trees and shrubs in front of the motel. From 1953 to 1965 plaintiff gradually expanded the motel from 6 to 50 cement block units.

8. According to the depreciation schedules attached to plaintiff's federal income tax returns her capital investment in the motel totalled over $233,000, including costs of additions (over $117,000), reconditioning and remodeling (over $17,000), furniture and fixtures including air conditioners and television sets (over $90,000), swimming pools and related costs in 1955 and 1961, and a tennis court in 1963 (over $9,000). These expenditures were paid for from revenues from operation of the motel and plaintiff's other business interests, plus small bank loans which were repaid from business revenues.

9. In 1971 the motel was operated from mid-May through October. It employed four maids, a desk clerk, and a yard boy in addition to plaintiff and her niece and nephew, the Elders. Salary expense was listed by plaintiff on her return as exceeding $29,000 in 1971.

10. In 1965 plaintiff constructed a restaurant on the property across the highway from her motel at a cost

of over $90,000 for the building, furniture, and fixtures paid for mostly on time. She also borrowed a small part of the cost and used about $9,000 of insurance proceeds received after the death of her husband to pay for fixtures for the restaurant. The building and fixtures were fully paid for by 1971.

11. In 1971 the restaurant was operated from mid-May through October. It accommodated 284 customers at capacity. During 1971 the restaurant was operated by a salaried chef who supervised the other personnel and handled the purchasing of supplies and planning of meals. Other personnel included two servers and three other employees. Plaintiff did not work in the restaurant on a regular basis during that year. However, she was at the restaurant much of the time and assisted whenever necessary.

12. According to plaintiff's federal income tax return, salaries for personnel of the restaurant exceeded $40,000 in 1971. Some vegetables used in the restaurant were grown on the property. The cost of other food supplies were listed as almost $30,000 on plaintiff's federal income tax return.

13. Before the construction of her restaurant in 1965, plaintiff had first tried using the land in about 1954 to grow vegetables for purposes of operating a truck farm. In order to make the land productive, she and her husband hauled many loads of leaves and sawdust from a nearby mill for several years to plow into the land as mulch. She hauled the vegetables around in her car trying unsuccessfully to sell them to restaurants. The restaurants apparently preferred canned vegetables. She also sold a few vegetables directly from the garden to passersby. Due to her inability to make enough money selling vegetables, however, plaintiff discontinued the truck farm until she built her restaurant across the high-

way from her motel. Then she began growing lettuce, radishes, carrots, turnips, onions, corn, melons, squash, garlic, rhubarb, and berries to use in her restaurant, and she eventually expanded her garden.

14. Certificates of Possessory Holding Nos. 77 and 78, which were issued by the principal chief of the Band on January 27, 1965, recognize plaintiff's interest in the land underlying the restaurant and motel (including the portion purchased from Kathleen Welch), respectively. Prior to the issuance of these Certificates, her interests were recognized in 1954 by the Tribe in Resolution 34 and reaffirmed on January 27, 1958. (See finding 44, *infra.*)

15. During 1971 plaintiff also held an interest in other land on the Reservation. One parcel, known as the Old Post Office Lot, or Tahquette Indian Store property, was obtained by her through purchase and inheritance. The interest was originally held by Ernest (Dewey) Tahquette, plaintiff's brother, from whom in 1936 Mrs. Parton purchase a one-half interest. In 1938 plaintiff and Mrs. Parton each purchased one-fourth interests from their brother, Glenn. Plaintiff then inherited Mrs. Parton's three-fourths interest when the latter died in 1953.

16. When plaintiff acquired the Old Post Office Lot, the property included an old, dilapidated building. She repaired and repainted the building and operated it as a craft shop until 1963.

17. In 1963 plaintiff leased the Old Post Office Lot and the improvements thereon to a niece, Betty Elder, and her husband, Bill Elder. The lease provided for annual rentals of $1,875, of which $1,500 (80 percent) was payable to plaintiff and $375 (20 percent) was payable to the Tribe. The lease granted the lessee a 5-year option of renewal after the first year with a rental adjustment to be made when the lessor constructed a new craft shop building. Two amendments to the lease were subsequently added. In 1968 plaintiff removed the existing building and constructed a larger, modern structure containing a craft shop and four rental apartments, known as the "Cool Waters Craft Shop and Apartments," at an approximate cost of $50,000, of which $10,000 was obtained as a loan secured by stock inherited from plaintiff's father. The loan was repaid from plaintiff's income. In 1971 the gift shop was operated by the Elders. At least one of the apartments was rented out.

18. During 1971 the Old Post Office Lot was not covered by a Certificate of Possessory Holding. Certificate No. 197, which was issued on April 9, 1976, now covers this land. Plaintiff's interest in the land had previously been recognized by the Tribe in Resolution 34 in 1954 and reaffirmed in 1958.

19. In addition, during 1971 plaintiff held an interest in land on the Reservation known as the Old Filling Station Lot. She inherited the interest in 1953 from Mrs. Parton, who had purchased it in 1938 from a second brother, Wayne Tahquette. In 1953 the lot contained an old wooden building, which plaintiff and her husband operated as a craft shop after improving it with new floors, doors, shelves, and counter. She replaced it with a new building in 1959 costing about $10,000, which she continued to operate as a craft shop until leasing it in 1963 to Steve Stratos (a non-member of the Tribe) who continued it as the "Golden Arrow Craft Shop."

20. According to plaintiff's tax return for 1971 she received rental income of $5,280 for the lease of the Golden Arrow Craft Shop to Steve Stratos for that year, and rental income of $1,000 from him for one of the Cool Waters Apartments.

21. During 1971 the Old Filling Station Lot was not covered by a Certificate of Possessory Holding. Certificate No. 197 was issued on April 9, 1976, to cover this land. Mrs. Critzer's interest in the land had previously been recognized by the Tribe in Resolution 34 in 1954 and reaffirmed in 1958.

22. The Old Post Office and Old Filling Station Lots are located in a scenic area in the Village of Cherokee on main highways 19 and 441, about 1½-2 miles from plaintiff's motel and restaurant. A steep mountain rises immediately behind them. In front of them, across the highway, is the Oconaluftee River and another steep mountain.

23. Since plaintiff was unable to obtain a mortgage on her trust property, and there were no tribal loan funds available to use for improvements, she made gradual improvements using her own funds derived from the operation of her businesses, what little money she could borrow using her inherited stock as collateral, and her own labor and that of her husband. Some equipment was purchased on time. She helped construct the improvements on her properties and worked in her motel, restaurant, and garden from 5:00 a.m. until 1:00 a.m., 7 days a week during the 5½-month open season each year.

24. Plaintiff's income in 1971 was derived from (a) operating profits of her motel, restaurant, and gift shop, (b) rental of a gift shop and apartments, and (c) interests and dividends. She concedes that the interest and dividends (over the $100 dividend exclusion) are taxable.

25. When Mr. Critzer died in 1966 the balance in the Critzers' savings account was $30,000. By 1971 plaintiff had increased the amount in her savings account to more than $120,000 and had more than $383,000 in-

vested in buildings, furniture, and fixtures for her various businesses.

26. The Cherokee Indian Nation formerly occupied a vast region in North and South Carolina, Tennessee, Alabama, and Georgia. Pursuant to a series of treaties culminating with the Treaty of New Echota in 1835, the Tribe surrendered its right to lands in North Carolina and left the State in exchange for certain payments and a grant of land in the West.

27. Some Cherokee Indians remained in the East. In 1866 North Carolina granted the Tribe permission to stay within the State. Public Laws of North Carolina of 1866, c. 56, p. 20. In 1868 a constitution was adopted by the Tribe. In 1889 North Carolina incorporated the Eastern Band of Cherokee Indians and granted a charter for its tribal government.

28. In 1868 Congress provided that the Eastern Band of Cherokee Indians was subject to supervision by the Secretary of the Interior and the Commissioner of Indian Affairs to the same extent as other tribes. Act of July 27, 1868, ch. 259, 15 Stat. 228. In 1924 Congress provided for the final disposition of affairs of the Tribe. Act of June 4, 1924, ch. 253, 43 Stat. 376, 25 U.S.C.A. § 331 (note).

29. The 1924 Act authorized the Band to convey its land to the United States in trust (Section 1), called for the preparation of a membership roll (Section 2) and the surveying of the conveyed land (Section 4), and provided that the lands and money of the Band were to be "allotted and divided" equally among the members of the Band.

30. Under Section 16 of the 1924 Act, each allottee was to be issued a deed conveying to him "all right, title, and interest of the United States, as trustee, and of the

band, and of every other member thereof" in the allotted land subject to the conditions and restrictions imposed by the Act. Section 19 restricted voluntary or forced alienation of the land for a period of 25 years from the date the deed was to be recorded, or such shorter period as may be determined by the Secretary of the Interior.

31. Section 21 of the 1924 Act, dealing with taxation, states as follows:

> Sec. 21. That all lands, and other property, of the band, or the members thereof, except funds held in trust by the United States, may be taxed by the State of North Carolina, to and including the tax year following the date of this Act. Such taxes shall be paid from the common funds of said band for such period, except upon such tracts as shall have been lawfully sold prior to the date when tax assessments can be made thereon under the State law. All tax assessments made pursuant to this Act on restricted allotments or undivided tribal property held in trust by the United States shall be subject to revision by the Commissioner of Indian Affairs for a period of one year following the date when such assessments are spread on the local tax rolls, but if he shall take no action thereon during said year, such assessments shall be final, but this shall not be construed to deprive any allottee of any remedy to which he would be entitled under the State law: *Provided*, That such restricted and undivided property shall be exempt from sale for unpaid taxes for two years from the date when such taxes become due and payable, and no penalty for delinquency in the payment of such taxes shall be charged or collected for or during said period, so that Congress may have an opportunity to make provision for the payment of such taxes if the band, or tribal, funds are found insufficient for the purpose.

> After the expiration of the tax year following that in which this Act is approved all lands allotted to members of said band, from which restrictions shall have been removed, shall be subject to taxation the same as other lands. But from and after the expiration of said tax year all restricted allotments and undivided property shall be exempt from taxation until the restrictions on the alienation of such allotments are removed or the title of the band to such undivided property is extinguished.

32. In 1925 the Eastern Band of Cherokee Indians, pursuant to a tribal resolution passed on November 6, 1919, for the purpose (*inter alia*) of protecting the members of the Band with respect to the taxation of their lands as in the case of Indians on reservations elsewhere, conveyed its land to the United States in trust as authorized in Section 1 of the 1924 Act.

33. In 1931 the Secretary of the Interior was authorized to defer making allotments on the Eastern Cherokee Reservation until further direction of Congress. Act of March 4, 1931, 46 Stat. 1518. In 1934 Congress, in a general statute, prohibited any further allotments on any Indian reservation. Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.* The Eastern Band of Cherokee Indians accepted the Indian Reorganization Act of 1934 on November 7, 1934, by tribal resolution.

34. Since the allotting of land on the Eastern Cherokee Reservation was never accomplished, legal title to all such land has, since 1925, remained in the United States in trust for the Eastern Band of Cherokee Indians.

35. The Eastern Cherokee Indian Reservation consists of approximately 56,000 acres located primarily in Swain and Jackson Counties, North Carolina.

36. The land on the Eastern Cherokee Indian Reservation is owned in its entirety by the United States in trust for the Eastern Band of Cherokee Indians. About 85 percent of the land is being utilized by individuals in the form of small parcels known as "possessory holdings" ranging in size from a fraction of an acre to several hundred acres. The remaining 15 percent of the land is reserved exclusively for tribal use.

37. The members of the Tribe use their possessory holdings for homesites, for very limited agricultural pursuits, for certain forestry activities, and for commercial purposes.

38. Currently, there are about 5,000 members of the Eastern Band of Cherokee Indians, comprising some 1,200 families, living on or immediately off the reservation.

39. The Tribe is governed by an elected 12-man council and a principal chief. The council is authorized by State charter to direct the management and control of real and personal property held by the Tribe.

40. The Eastern Cherokee Reservation is well below the average non-Indian community with respect to education, health, housing, unemployment, and family income. However, steady progress is being made in alleviating these problems through the efforts of the federal Government and the Tribe.

41. Tourism is the number one factor in the Eastern Cherokee economy in terms of both personal income and employment. The tourist industry on the Reservation developed after World War II due to the extraordinary natural beauty of the Reservation which is located adjacent to the Great Smoky Mountains National Park. As of 1972 there were approximately 170 businesses operating on the Reservation, about 80 percent of which were oriented toward the tourist. In the Village of Cherokee in 1972 there were 38 motels, 26 eating facilities, and 48 shops. All of these businesses are on tribal land or on individually-owned possessory holdings. In 1971 they generated $9 million in retail trade and resulted in $373,049 in lease payments to the Tribe and to individual owners. Three manufacturing plants are located on the Reservation.

42. The tourist industry on the Reservation has provided many jobs for the Indian people, but the industry is highly seasonal in nature, most of the businesses being open only in the summer. As a result, unemployment drops to as low as one percent in the summer and rises to 15 to 20 percent in the winter. The development of additional tourist enterprises on the Reservation has been inhibited by a lack of adequate financing and, more importantly, a severe shortage of managerial-level personnel among the Indians which has limited Indian participation in the profits of the industry. One significant innovation in obtaining outside financing has been the development of leasehold mortgage arrangements; as a result of this development, banks and governmental agencies have become more willing to supply financing for Cherokee businesses.

43. Use of reservation land by members of the Tribe is governed by the Tribal Realty Code.

44. In 1960 the Tribe approved the issuance of Certificates of Possessory Holding as evidence of the right of an individual member of the Tribe to use and occupy specific parcels of reservation land. Prior to that time, the interests of individual members of the Tribe in reservation land were recognized by tribal resolution.

45. The recognition of the right of an individual member of the Tribe to use a specific parcel of property is based upon historical use by the individual or his family. There has been no pro rata division of land interests on the Eastern Cherokee Reservation. The individual's

interest is limited to use of the land, title to which remains in the United States in trust for the Tribe. Title to the land covered by a possessory holding cannot pass to the individual member of the Tribe, given the present applicable statutory structure governing the reservation lands.

46. Under the Tribal Realty Code, if the land is commercially leased the tribal member receives 70 percent of the rents and the Tribe receives the balance. If the land rented is improved the tribal member receives 80 percent of the rents, and the Tribe the rest. All leases must be approved by the Tribal Council and representatives of the Department of the Interior. If minerals are found on the land, the tribal member receives 90 percent of the net proceeds and the Tribe 10 percent. If an Eastern Cherokee Indian sells his possessory interest to another member of the Tribe, he may keep the entire proceeds and nothing is paid to the Tribe.

47. A Certificate of Possessory Holding, pursuant to the Tribal Code, expressly provides that legal title to the land is vested in the United States in trust for the Eastern Band of Cherokee Indians. The Certificate also expressly reserves to the Eastern Band of Cherokee Indians (1) the power and responsibility to control leasing, transfer, and the manner and method of inheritance and devise of the possessory holding; (2) all minerals and the right to issue mineral leases and permits therefor, and to draw or allocate any income therefrom; (3) the power to control the cutting of timber on the possessory holding; (4) the power to grant or create easements and rights-of-way over the possessory holding; and (5) the right to zone the land area within which the possessory holding is situated and to control the type and nature of use thereof.

48. The Certificate of Possessory Holding expressly reserves to the possessory holder (1) the right to con-

struct buildings and other improvements on the holding for residential, business, industrial, or other purposes subject to the approval of the Business Committee, (2) the right to collect damages for destruction of any improvement due to the issuance of an easement or right-of-way over the holding by the Tribe, (3) the right to collect damages for the disturbance of the land surface or interference with use thereof due to the Tribe's issuance of a mineral lease or permit, (4) the right to transfer the holding to another member of the Tribe under such conditions as may be prescribed by the Tribal Council, and (5) the right to grant leases or permits on the holding to a member or non-member of the Tribe for a definite period of time and for a prescribed consideration in accordance with the rules and regulations of the Bureau of Indian Affairs and the Tribe and subject to the approval of the Business Committee and the Secretary of the Interior or his authorized representative.

49. When a possessory holder dies, the Tribe normally permits his possessory interest to pass to his devisees or heirs under North Carolina law, provided the devisees or heirs are members of the Tribe. There are also provisions in the Tribal Code for non-member spouses of deceased members to have life use rights. In addition the Tribe cannot reassign a possessory holding from one Indian to another without affording Due Process rights.

50. The Certificate of Possessory Holding also expressly states that any improvements placed upon the land are considered to be the personal property of the possessory holder in which the Band has no interest. The improvements may be bequeathed by will and, in the absence of a will, will pass in accordance with the inheritance laws of the State of North Carolina. The Certificate further provides that if the improvements pass to a non-member of the Tribe, the Tribal Council, at its option, shall (1) purchase the improvements at their

fair appraised value, or (2) give tribal approval to a permit or lease for such period as shall enable the non-member to amortize the value of the improvements. Special provisions are made for surviving non-member spouses where there are surviving minor children who are members of the Tribe.

51. The control exercised by the Eastern Band of Cherokee Indians over possessory holdings on its Reservation through the Tribal Realty Code is similar to that exercised by other tribes over allotted lands on their reservations through land use ordinances, conservation ordinances, zoning ordinances, and in some instances ordinances for mineral development and extraction.

52. The federal government, acting through the Department of the Interior and the Bureau of Indian Affairs (BIA), exercises considerable supervision over the affairs of the Eastern Band of Cherokee Indians and its members. The BIA maintains an agency, known as the Eastern Cherokee Indian Agency (referred to herein as "the Agency"), in Cherokee, North Carolina. The superintendent of this Agency from 1966 to 1974 was Theodore C. Krenzke. Mr. Krenzke, who at the time of trial was director of the BIA's Office of Indian Services in the Washington, D.C., office, appeared as a witness at the trial.

53. In 1971 the Agency had approximately 175 employees and an annual budget of approximately $3,000,000. Its general function is to administer the laws and policies of the United States and of the Department of the Interior regarding the Government's Indian programs. More specifically, the Agency's objectives are: (a) to provide a variety of programs, including education, economic development, and social services, to the Eastern Bank of Cherokees and its members for their improvement and betterment; (b) to carry out the trust responsibilities of the United States with respect to the

trust lands on the Reservation; and (c) to assist the Tribe and its members to develop to their maximum potential so that they may eventually take their places as "full citizens" in our society.

54. The ability of members of the Tribe to manage their own affairs varies with the individual. Some people are quite able to manage their own affairs and others, primarily due to lack of education, would have a great deal of difficulty in doing so.

55. The BIA treats possessory holdings on the Eastern Cherokee Indian Reservation the same as it treats any other Indian trust or restricted land, either tribally-owned or allotted, on Indian reservations throughout the country. Its responsibilities on the Eastern Cherokee Reservation are generally the same as on other reservations with land held in trust by the United States.

56. The BIA considers that its trust responsibilities extend to the reservation lands and to the permanent improvements thereon. This includes supervision of the manner in which a possessory holder conducts his business on the land. Although the BIA provides services to all people who are members of the Tribe, the degree of services provided is directly related to the need of the individual.

57. A major activity of the Agency involves supervising the development of lands and businesses on the Reservation. In the case of leases by an Indian possessory holder, including leases for commercial facilities, the Agency supervises the negotiation and drafting of the leases and provides standard lease forms. The leases are not valid until approved by the Agency on behalf of the Secretary of the Interior. During the course of a lease, the Agency monitors the activities of the lessee to assure that they conform to the terms of the lease as well as to applicable federal laws and regula-

tions. The Agency requires that improvements be kept in repair and be properly insured, that the lessee pay all applicable taxes and assessments, that the lessee obtain an annual traders' license and maintain a bond, and that the lessee submit annual audit reports to the Agency for review. If a lessee fails to comply with any of the lease terms or with other laws or regulations, the Agency takes corrective action. The lease terms make the Tribe and the individual possessory holder joint lessors and the Agency protects the interests of both.

58. It is the policy of the Agency to see that any buildings or other improvements erected upon the land by a lessee belong to the Indian lessor at the end of the lease and a clause to this effect is specifically included in the Agency's standard lease form.

59. The BIA has never issued certificates of competency to members of the Eastern Band of Cherokee Indians. As a general matter, individual Indians are not under the control of the federal Government in most of their day-to-day activities, and, with the exception noted, may manage and conduct their own business affairs.

60. In regard to plaintiff's enterprises, approval had to be obtained from the Agency to construct the buildings. The Agency undertook its standard supervisory activities with respect to the negotiation, drafting, and monitoring of plaintiff's leases with Bill and Betty Elder and with Steve Stratos. In fact, the Agency had to intervene in order to resolve a problem between plaintiff and Bill and Betty Elder, her lessees, regarding improper maintenance of the leased property.

61. The Agency does not consider that supervision of the transfer of possessory holdings is part of its trust responsibilities, this being a matter exclusively for tribal regulation. The Tribe virtually always approves transfers of possessory holdings when done in conformance

with tribal regulations and has never, to Mr. Krenzke's knowledge, arbitrarily taken a possessory holding from one Indian and given it to another.

62. In prior criminal litigation brought against plaintiff for tax fraud, the Department of the Interior for legal and policy reasons formally took the position that it considered possessory holdings on the Eastern Cherokee Indian Reservation tax exempt to the same extent as trust and restricted allotments on other Indian reservations and that it considered the income derived from the businesses conducted on trust lands to be tax exempt.

63. In Mr. Krenzke's opinion, the goal of the Eastern Cherokee Agency to help individual Indians develop to their maximum potential to take their places in society has been achieved in the case of plaintiff.

64. The BIA encourages the responsible commercial development of reservation land. If performed in a responsible manner, the Bureau would encourage the construction and operation of factories, shopping centers, and amusement or recreational facilities on individual possessory holdings.

65. Plaintiff filed a federal income tax return, Form 1040, for the year 1971, on or about June 16, 1972. This return showed a tax due of $8,941.59. The amount of tax shown to be due was paid with the return.

66. On or about May 7, 1974, a claim for refund of $8,941.59, the amount paid with the return, was filed as an amended federal income tax return. Plaintiff instituted this action on April 23, 1975, after the expiration of 6 months from the date the claim was filed.

67. On or about January 12, 1976, the Commissioner of Internal Revenue assessed against the plaintiff a tax deficiency of $4,286.22, in addition to a penalty in the amount of $1,304.32, and interest in the amount of

$1,032.22, for a total assessment of $6,622.76. Defendant, through its amended answer filed on February 24, 1976, has brought a counterclaim for the amount of the outstanding balance due.

68. By order of December 8, 1975, the issue of exemption was severed for trial, reserving all additional issues for later proceedings.

CONCLUSION OF LAW

Upon the trial judge's findings and opinion, which are adopted by the court, the court concludes as a matter of law that plaintiff's income derived from her possessory holdings is not subject to the federal income tax. Therefore, she is not liable thereon and is entitled to recover the amount paid; defendant's counterclaim is dismissed. The amount of recovery is to be determined pursuant to Rule 131(c).

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 134-75

(Decided April 18, 1979)

AMY T. CRITZER

v.

THE UNITED STATES

Charles A. Hobbs, attorney of record, for plaintiff. *Wilkinson, Cragun & Barker, Herbert E. Marks, Jerry R. Goldstein, Coward, Coward & Dillard, Orville D. Coward, and Roger L. Dillard*, of counsel.

M. Carr Ferguson, Assistant Attorney General for defendant. *Theodore D. Peyser* and *Gilbert W. Rubloff*, of counsel.

Before FRIEDMAN, *Chief Judge*, DAVIS, NICHOLS, KASHIWA, KUNZIG, BENNETT, and SMITH, *Judges, en banc.*

OPINION

KUNZIG, *Judge*, delivered the opinion of the court:

In this income tax case of first impression, plaintiff Amy T. Critzer, an enrolled member of the Eastern Band of Cherokee Indians (the Tribe), operates several businesses and derives income from certain leases on build-

ings, all of which are physically located on tax-exempt reservation land. The issue is whether or not the income received from the operation of the businesses and the building leases is exempt from federal income tax. We hold that it is *not* exempt.

During the year 1971, plaintiff operated a 50-unit motel, a 284-seat restaurant, and a gift shop. She also rented out two craft shops and certain apartments. All of these structures are located on the federally-owned Eastern Cherokee Reservation (the Reservation) in North Carolina.[1] All Reservation lands are owned by the United States in trust for the Tribe pursuant to the Act of June 4, 1924, 43 Stat. 376, 25 U.S.C. § 331 (note). Under this 1924 Act, the lands were to be allotted to the individual members of the Tribe. Before any allotments were made, however, Congress passed the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, precluding further allotments.

The Tribe has allowed its members to use designated portions of the Reservation land on a continuous and exlusive basis. The right of a Tribe member to use a specific parcel of property is based upon historical use by the individual or his family. In 1960, the Tribe began issuing Certificates of Possessory Holding[2] to record

[1] The Reservation consists of approximately 56,000 acres, and the Tribe currently has about 5,000 members.

[2] Pursuant to the Tribal Code, the Certificate expressly provides that legal title is vested in the United States in trust for the Tribe. The Tribe reserves the power to control leasing, transfers, and inheritance of holdings, to grant or create easements and rights-of-way, and to zone the land. The Tribe also has the right to all minerals and the power to control the cutting of timber on the holding.

If the land is commercially rented, the tribal member receives 70 percent of the rents, and the Tribe receives the balance. (If the land is improved, the member receives 80 percent.) Leases must be approved by the Tribal Council and the Department of the Interior. The Tribe receives 10 percent of the proceeds from the sale of minerals found on the land. A member of the Tribe can retain the entire proceeds of a sale of a possessory holding to another member of the Tribe.

formally an individual's exclusive right to use parcels of Reservation land. Prior to 1960, this right had been recognized simply by tribal resolution. A Certificate of Possessory Holding reserves to the holder the right to construct buildings and other improvements which are considered the personal property of the holder and in which the Tribe has no interest. There is also a limited right to transfer the holding to other members of the Tribe. Upon the death of a possessory holder, the Tribe normally permits his interest to pass to his devisees or heirs under North Carolina law, provided they are members of the Tribe.[3] The Tribe cannot reassign a possessory holding without providing due process rights to the incumbent holder.

A possessory holding is not an allotment, but differs only in the fact possessory holdings can never ripen into fee title. The Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, precluded further allotments in order to halt the practice of many Indians who would receive fee title and promptly sell the land, leaving themselves without any means of support and adversely affecting the unity of the Tribe.

Plaintiff Critzer was born on the Tribe's Reservation in western North Carolina. After a twenty-year career as a Registered Nurse, Mrs. Critzer returned to the Reservation in 1953. At that time, her assets consisted of about $1,000, some stock, half of a possessory interest in the reservation land underlying the six-unit Cool Waters Motel, and a half interest in the motel, which she had inherited from her father. (The other half-

[3] Non-member spouses of deceased members have use rights for life.

interest in the land and motel was left to Mrs. Critzer's twin sister, Marion T. Parton.) The motel had been in disuse for about 30 years and lacked the proper furniture and facilities; however, it was situated on a main highway among beautiful mountains and a scenic creek, and was thus favorably located for tourists.

The two sisters started operating the motel, but Mrs. Parton died in late 1953, leaving her half interest to plaintiff. Mrs. Critzer and her husband began improving the property, gradually expanding the number of rooms from six to fifty by 1965. Using revenues from the operation of the motel and other of plaintiff's business interests, and several small bank loans, capital investments totalling over $233,000 were made. These improvements included air conditioning, television sets, a swimming pool, and a tennis court.

In 1965, plaintiff constructed a 284-seat restaurant on the property across the highway from her motel. The cost of the building, furniture and fixtures exceeded $90,000. She also added a gift shop.

Mrs. Critzer has further interests in other land on the Reservation she acquired through purchase and inheritance, and full interest in a parcel of reservation land known as the Old Post Office Lot. She repaired the building on this lot and operated it as a craft shop until 1963. In 1968, Mrs. Critzer replaced the existing building with a larger structure containing a craft shop and four rental apartments. This new structure cost $50,000, $10,000 of which was obtained as a loan and repaid from plaintiff's income.

She had also inherited from her sister an interest in a parcel of reservation land known as the Old Filling Station Lot. After operating a craft shop there for several years, she constructed a new building (at a cost of $10,000) and then continued her craft shop business there

until 1963. At that time, she leased the building to a non-member of the Tribe who continued to operate it as a craft shop.

Thus, during the year in question (1971), plaintiff received income from the operation of the restaurant,[4] gift shop, and motel,[5] from the rental of the craft shops and apartments,[6] and interest and dividends. Mrs. Critzer concedes the taxability of the interest and dividends, but contests the taxability of all other 1971 income, which she reported and paid taxes on in the amount of $8,941.59. She then filed a claim for refund in this court. The IRS counterclaims for $6,622.76 (a $4,206.22 deficiency, plus penalty and interest). Thereafter the tax exemption problem was severed by the Trial Judge who recommended a decision on this issue for plaintiff. The Government now contests this recommendation, and the question of exemption is the sole issue before us at this juncture.[7]

Plaintiff argues first and foremost that her business and leasing income is clearly exempt under § 21 of the

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[4] In 1971 the restaurant was open from mid-May to October. During this time it was operated by a chef who supervised the other five employees and handled purchasing of supplies. Salaries of restaurant personnel exceeded $40,000 that year.

[5] In 1971 the motel was open from May to October, employing eight people whose combined salaries exceeded $29,000.

[6] Plaintiff's 1971 tax return shows rental income of $5,280 for the craft shop and $1,000 for one of the apartments.

[7] The Trial Judge, in a recommended opinion, held for the plaintiff, concluding that such income was exempt. The findings are not printed therein since those relied upon by the court, and necessary to the result, are contained in this opinion.

A threshold issue, presented to our Trial Division, was whether or not Mrs. Critzer's "possessory holdings" were exempt to the same extent as trust allotments on other Indian reservations. The Trial Judge agreed with plaintiff that these "possessory holdings" were equivalent to trust allotments and, therefore, covered by the tax-exempting provisions of the Act of June 4, 1924, 43 Stat. 376, 25 U.S.C. § 331 (note) (1976). The Government has chosen not to reargue this issue before us.

1924 Act, although acknowledging the courts have held income must be directly derived from the land. She claims it is so derived. Defendant disagrees.

Mrs. Critzer further claims her argument gets an added boost since as long ago as 1903 in *United States* v. *Rickert*, 188 U.S. 432 (1903), the Supreme Court held that if the Indian land is tax-exempt, the exemption applies to permanent improvements as well.

Defendant counters that plaintiff's second point assists her in no way whatsoever because the *Rickert* case applies only to property taxes, not income taxes (as here).

We hold for the Government.

I.

Indians, like all other citizens, are subject to the federal income tax unless some provision of a statute or a treaty expressly and specifically confers an exemption. Section 21 of the 1924 Act is such a statute:

> That all lands, and other property, of the band, or the members thereof, except funds held in trust by the United States, may be taxed by the State of North Carolina, to and including the tax year following the date of this Act. Such taxes shall be paid from the common funds of said band for such period, except upon such tracts as shall have been lawfully sold prior to the date when tax assessments can be made thereon under the State law. All tax assessments made pursuant to this Act on restricted allotments or undivided tribal property held in trust by the United States shall be subject to revision by the Commission of Indian Affairs for a period of one year following the date when such assessments are spread on the local tax rolls, but if he shall take no action thereon during said year, such assessments shall be final, but this shall not be construed to deprive any allottee of any remedy to which he would be entitled under the State law: Provided, That such restricted and undivided property shall be exempt from sale for unpaid taxes for two years from the date when such taxes become due and payable, and no penalty for delinquency in the payment of such taxes shall be charged or collected for or during said period, so that Congress may have an opportunity to make provision for the payment of such taxes if the band, or tribal, funds are found insufficient for the purpose.
>
> After the expiration of the tax year following that in which this Act is approved all lands allotted to members of said band, from which restrictions shall have been removed, shall be subject to taxation the same as other lands. But from and after the expiration of said tax year *all restricted allotments and undivided property shall be exempt from taxation* until the restrictions on the alienation of such allotments are removed or the title of the band to such undivided property is extinguished. (emphasis added)

Though at first glance it may seem that "*all* restricted allotments and undivided property shall be exempt from taxation," the Supreme Court has restricted the exemption to income derived directly from the land.[8] Mrs. Critzer says her income *is* directly derived from the land. Her buildings sit on the land; her businesses are conducted in the buildings; the beautiful view, which attracts customers to her motel, is derived from the land. On the other hand, the Government argues that income can only be considered as derived directly from tax exempt Indian land where the essential and primary source of the revenue is the land itself.

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[8] *Squire* v. *Capoeman*, 351 U.S. 1 (1956); *see Big Eagle* v. *United States*, 156 Ct.Cl. 665, 300 F.2d 765 (1962).

The point of departure for our consideration of this matter is *Squire* v. *Capoeman*, 351 U.S. 1 (1956). There the Government had sought to tax an Indian's capital gain resulting from the severance and sale [9] of timber on allotted land. The sale of the timber had substantially reduced the value of the land and the Court held that to impose a tax would violate the Government's promise to transfer the fee to the allottee "free of all charge or incumbrance whatsoever." [10] The Court went on to say that "[t]he purpose of the allotment system was to protect the Indians' interest and 'to prepare the Indians to take their place as independent, qualified members of the modern body politic.' " [11]

As to the method for accomplishing this purpose, the Court stated that "it is necessary to preserve the trust and *income derived directly therefrom*, but it is not necessary to exempt reinvestment income from tax burdens." [12] (emphasis added) The reference to reinvestment income was necessary to distinguish the case from the earlier decision in *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418 (1935). The Indian taxpayer in *Superintendent* had reinvested the income surplus from his allotment and the Supreme Court held that the *reinvestment* income was taxable.

Following *Capoeman*, the IRS published Revenue Ruling 56-342 [13] stating it would treat income "derived directly from allotted and restricted Indian lands" as exempt from the federal income tax. "Such exempt income includes rentals (including crop rentals), royalties, proceeds of sales of the natural resources of such land, and income from the sale of crops grown upon the land and from the use of the land for grazing purposes." [14]

[9] The sale was made by the Department of Interior in its capacity as trustee.

[10] 351 U.S. at 6-7.

[11] *Id.* at 9.

[12] *Id.*

[13] Rev. Rul. 56-342, 1956-2 Cum. Bull. 20.

Two years later, the IRS tried to limit the exemption, stating that it would not be available to proceeds from the sale of cattle raised on allotments.[15] This Ruling was found to operate to the detriment of an allottee who used his land for grazing *vis a vis* one who rented his land to others for grazing. The IRS's solution,[16] to allow part of the proceeds from the sale of cattle or other livestock to be exempt in an amount equivalent to the grazing fees that could have been obtained had the land been so leased, also proved unworkable.[17]

Finally, in Revenue Ruling 62-16 [18] the agency said:

• • • •

> Upon further consideration and in view of the difficulties . . . in allocating the portion of livestock sales proceeds attributable to the land and the portion attributable to other factors, such as labor, the use of equipment, and the like, the determination has been made to treat the full sums received as "derived directly" from the lands within the meaning of Revenue Ruling 56-342, just as in similar circumstances, under that Ruling, proceeds from the sale of crops grown upon trust allotments are so treated.

Plaintiff argues that her income falls within the category of being "directly derived" under *Capoeman*. Referring to the IRS policy of exempting income from farming and ranching operations, *supra*, she argues that her income is indistinguishable in principle and should be likewise exempt. Since plaintiff's possessory holdings are

[14] *Id.*

[15] Rev. Rul. 58-64, 1958-1 Cum. Bull. 12.

[16] Rev. Rul. 60-377, 1960-2 Cum. Bull. 13.

[17] *See* Rev. Rul. 62-16, 1962-1 Cum. Bull. 7, 8.

[18] *Id.*

ill-suited for farming or ranching, she claims that her land is being put to its "highest, best, and most natural possible use" and the income is "just as much 'directly derived from the land' " as a farmer's or a rancher's.[19]

We do not agree. Income from businesses such as plaintiff's is *not directly derived from the land.* While there have been cases since *Capoeman* upholding exemptions from income tax, they have dealt with activities unlike Mrs. Critzer's. *See, e.g., Stevens* v. *Commissioner,* 452 F.2d 741 (9th Cir. 1971) (farming and ranching operations); *United States* v. *Daney,* 370 F.2d 791 (10th Cir. 1966) (bonuses for oil and gas leases); *Big Eagle* v. *United States,* 156 Ct.Cl. 665, 300 F.2d 765 (1962) (royalty income from tribal mineral deposits). Plaintiff has been unable to refer us to any case extending an exemption from federal income tax to business or rental income such as is found here. To agree with plaintiff would require us to ignore the word "directly" in the "directly derived" test.

How can it legitimately be said that the cooking of food in a restaurant creates income "directly derived" from the land? The same point can be made concerning maids making beds, maids cleaning a motel, managers, accountants, yardboys, etc. The income derived from operating a motel stems in a far more important fashion

[19] In Rev. Rul. 67-284, 1967-2 Cum. Bull. 53, 56-57, the IRS set up a five-part test for determining if Indian income was exempt:

(1) the land must be held in trust by the United States;

(2) the land is restricted and allotted and held for the individual, non-competent Indian rather than the tribe;

(3) *the income must be "derived directly" from the land;*

(4) the statute, treaty, or authority evinces Congressional intent that the allotment be used to protect the Indian until he attains competency;

(5) the language of the authority in question indicates clear Congressional intent that the land is not to be taxed until conveyed in fee simple to the allottee.

from such items as these than it does from the land alone. Mrs. Critzer unquestionably improved the land, but these improvements were paid for primarily out of income that was generated by and reinvested in the motel, the restaurant, gift shop, craft shops, and the apartments. Both the taxpayer and her husband contributed all their time and effort to these enterprises.[20] In other words, labor also played an important part.[21]

The court recognizes, of course, that the land underlying the motel and other pertinent buildings was necessary to the operation of plaintiff's various businesses and other investments. However, Mrs. Critzer is effectively asking us to attribute *all* of her income (with the exception of dividends and interest) to just the land, and to ignore completely her interest in the improvements and the personal services rendered in connection therewith. In our opinion, it is clear that taxpayer's income was attributable primarily to the utilization of the capital improvements constructed on the land and her management of those assets. If plaintiff were to sit in a telephone booth on her Indian land and sell stocks and bonds by phone from the booth, it would be ludicrous to attempt to argue that any income, so earned, was directly derived from the land. At the other end of the spectrum, we have income from the profits derived from the sale of timber hewn from Indian land. *Squire* v. *Capoeman, supra.* This is easily recognizable as "directly derived" from the land. We believe that for tax purposes the income in the case at bar is more analogous to the sale of stocks and bonds situation than it is to the sale of timber in *Capoeman.*

[20] Until his death in 1966, Mr. Critzer had worked without salary for plaintiff in her various businesses.

[21] In *Strom* v. *Commissioner,* 6 T.C. 621 (1946), *aff'd per curiam,* 158 F.2d 520 (9th Cir. 1947), an Indian's income from fishing on tribal land was taxed. *See Jourdain* v. *Commissioner,* 71 T.C. No. 87, Docket No. 6021-76 (March 8, 1979).

Again, we do not say that the land is not of *some* value in helping create income such as that realized from the operation of a motel. Even the Government admits that it might be appropriate in certain instances[22] to allocate income based upon the relative value of the land vis-a-vis any improvements or services. However, we do not reach this problem of allocation in the matter of Mrs. Critzer. That issue remains for yet another case on another day, since plaintiff has not raised it in the case at bar.[22]

The benefits sought by the instant taxpayer were designed, many years ago, to shield an oppressed and unsophisticated people. Congress could not have intended that its laws would be used as a sword by which one group of businessmen could obtain perpetual and total tax shelters that are unavailable to all others, including Indians who have left their reservations to establish businesses elsewhere. *See Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 157 (1973).

It does not require great imagination to visualize this type of situation going further and further until exemptions are claimed for lawyers, doctors, steel mills, even a person selling stocks and bonds and running an investment business from a telephone booth on Indian land. There is no precedent for exempting the income merely because the business or building involved is located on tax-exempt land. There is no precedent for exempting the income claimed to be tax free by Mrs. Critzer in the case at bar. If Congress wishes to exempt any class of

[22] While this case only involves the tax year 1971, Mrs. Critzer has pending in the Tax Court suits involving the years 1963-70 and 1972-73. Plaintiff is represented by very competent counsel, and we are satisfied that it was a considered judgment not to ask for an allocation in this case. We decline to speculate as to whether or not it would have been possible to consider some part of plaintiff's income "directly derived" from the land, since we have not had the advantage of either briefs or oral argument on this issue.

citizens from the federal income tax, it knows how to do it. We have no authority to do so.

In summary, it is clear in this case that the income in question was not derived directly from the land, but rather emanated primarily from taxpayer's substantial investment in her improvements and her business activities related to those assets. There is no legal reason why this type of income should escape taxation while all other taxpayers, including Indians who work and operate businesses off the reservation, must pay their fair share of taxes.

We hold, therefore, that income realized by an Indian landholder in the operation of a motel, a restaurant, gift shop, and from building rentals, is not income directly derived from the land and is not immune from federal income tax simply because the businesses and buildings are physically located on tax-exempt reservation land.

II.

Plaintiff further argues, relying on *United States* v. *Rickert*, 188 U.S. 432, 442 (1903), that because the land itself is tax-exempt, her permanent improvements upon the land are also exempt. This argument, though superficially appealing, fails to consider the *type* of tax involved here. Unlike the *property* tax in *Rickert*, here we are faced with an *income* tax. The Supreme Court has recently underscored this distinction in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973). There, the State of New Mexico sought to tax a ski resort operated by an Indian tribe and located on land tax-exempt under a special statute, 25 U.S.C. § 465. The Court permitted a state gross receipts tax (akin to an income tax), but struck down the state compensating use tax (which it compared to a property tax).

The *Mescalero* Court distinguished *Capoeman*, noting that taxing proceeds from the sale of timber where the

timber constituted the major value of the Indian's allotted land would have frustrated Congress's purpose. 411 U.S. at 156 n. 12. However, the Court found no inconsistency with the intent of the Indian Reorganization Act in permitting a nondiscriminatory state gross receipts tax (i.e., permitted an "income tax") and refused to "imply an expansive immunity from ordinary income taxes that businesses throughout the State are subject to." *Id.* at 156 n. 12 and 157.

The Act of June 4, 1924 upon which plaintiff bases her exemption claim, states that "restricted allotments . . . shall be exempt from taxation . . . ." *Id.*, § 21. However, the Court in *Mescalero* refused to imply an exemption for state income tax purposes from a statute which reads "such lands or rights shall be exempt from State and local taxation," 25 U.S.C. § 465, and they held that exemption limited to taxes akin to property taxes.

It would appear that there is no authority whatever to support the notion that, for *income tax purposes*, permanent improvements erected on tax-exempt Indian land acquire the same status as the land itself. The case law cited by the plaintiff involved questions relating to the authority of state and local governments to impose property taxes of one kind or another on the assets of Indians. However, different legal principles are involved in the case at bar. Simply stated, whether realty or personalty owned by the instant taxpayer, or any other Indian, can or cannot be taxed by a state, county, or municipality, has no bearing on the dispositive issue here, *i.e.*, whether the *income* produced by an Indian's use of that property satisfies the Supreme Court's derived-directly-from-the-land standard and is thereby free of federal tax.

Moreover, the certificates of possessory holdings issued to taxpayer refer only to the right to use and occupy land, and they expressly state that "any improvements placed upon the land are considered to be the personal

property of the possessory holder in which the Band has no interest."

Tax exemptions, even those affecting Indians, are not granted by implication. Rather, if Congress intends to exempt certain income, it must do so by a definite expression. *See Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 156 (1973); *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956); *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 606-07 (1943).

Therefore, we hold a property tax exemption on Indian lands, which extends to permanent improvements on that land, is not an exemption for *income tax purposes* for income not derived directly from the land itself.

As mentioned *supra*, the issue of exemption now before us was severed by the Trial Judge. There still remain several other issues, including among others whether taxpayer understated income received from other sources and whether she was negligent in failing to file her return when due, as well as a Government counterclaim.

In summary, we hold that income realized by an Indian landholder in the operation of a motel, a restaurant, gift shop, and from building rentals, is not income directly derived from the land and is not immune from federal income tax simply because the businesses and buildings are physically located on tax-exempt reservation land. Further, we hold a property tax exemption on Indian lands, which extends to permanent improvements on that land, is not an exemption for income tax purposes for income not derived directly from the land itself.

CONCLUSION OF LAW

Upon the foregoing opinion and findings therein, the court concludes as a matter of law that plaintiff's income is not tax-exempt. The case is remanded to the Trial Division for further proceedings not inconsistent with this opinion.